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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 705

ELSA S. BURROWS, JOINED BY HER HUSBAND, WATERS F. BURROWS,

Appellants,

against

CHARLIE HAGERMAN, AS TAX COLLECTOR OF SARASOTA COUNTY, FLORIDA; GLOVER ASHBY, AS TAX ASSESSOR OF SARASOTA COUNTY, FLORIDA; C. M. GAY, AS COMPTROLLER OF THE STATE OF FLORIDA, AND LEROY T. FENNE,

Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

STATEMENT AS TO JURISDICTION PURSUANT TO RULE 12 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES.

This is an appeal from the final judgment of the Supreme Court of the State of Florida, which is the highest court of the State of Florida in which the decision could be had in a cause wherein there is drawn in question the validity of a statute of the State of Florida, on the ground of its being

repugnant to Section 1 of the Fourteenth Amendment of the Constitution of the United States and in contravention thereof.

This action was commenced in the Circuit Court of the Twelfth Judicial Circuit of the State of Florida in and for Sarasota County in Chancery which is the court of first instance. The case was taken from that court to the Supreme Court of the State of Florida by appeal after decision for defendants on a motion to dismiss the second amended complaint as insufficient on its face, and there the rulings and decision of the lower court were reviewed, the exception of petitioners overruled, and judgment entered for the defendants.

The action was for a declaratory judgment brought by petitioners against Charlie Hagerman as tax collector of Sarasota County Florida, Glover Ashby, as tax assessor of Sarasota County, Florida, C. M. Gay, as comptroller of the State of Florida, and LeRoy T. Fenne for relief from tax assessments of intangible personal property tax under the provisions of chapter 20724 of the laws of Florida for 1941.

The basis of the action, so far as here material, was that the tax in question was illegally and unconstitutionally assessed under a statute whose provisions violated the Constitution of the United States. Since no evidence was taken, and the proceeding was in the nature of demurrer the allegations of the plaintiff's pleading must be taken as true and these showed that the plaintiffs merely had certain rights as beneficiaries under certain trust indentures, the principal of which consisted of bonds and other securities, but neither the trust nor the securities constituting the corpus thereof were at any time within the State of Florida but were at all times since the year 1935 within the State of New York (2d Amended complt. par. —).

Three of these trusts are created by trust indentures and

the fourth trust is a testamentary trust. Copies of the trust documents are annexed in full to the second amended complaint (pages — Record).

Petitioner, Waters F. Burrows, is beneficiary named in two of the trust indentures. His wife, Elsa S. Burrows, is a trustee under another indenture, and under the terms of the will of her father, Oscar Scherer. In each instance the corpus of each of these trusts was located in the State of New York in the custody of a corporate trustee.

It is not contended that any tax has been assessed against this corpus and petitioners insist that nothing remains except the income from the trusts which was transmitted in each instance to the designated beneficiary by the trustee.

Under the Constitution of the State of Florida the taxation of income is expressly prohibited so that there is nothing against which the intangible personal property tax can be levied or assessed.

The trust indentures under which Waters F. Burrows is beneficiary are two in number:

(A) One dated February 10, 1930, which was made by Elsa S. Burrows residing in Scarsdale, Westchester County, New York, as grantor, Waters F. Burrows and Elsa S. Burrows, residing in Scarsdale, Westchester County, New York, as individual trustees, and Central Hanover Bank & Trust Company, a banking corporation organized and existing under the laws of the State of New York, as corporate trustee.

Said instrument provides that the trustee pay the net income from certain securities deposited with them in equal monthly instalments to Waters F. Burrows during the term of his natural life, and upon the death of said Waters F. Burrows, apply the net income thereof to the support of Elsa Anna Burrows, his daughter, during her minority and accumulate the balance of the said income and pay it to the

daughter when she shall have reached the age of 21 years and thereafter to pay the net income in equal monthly instalments to the daughter, Elsa Anna Burrows, during her natural life, and upon her death, to pay over and distribute the principal thereof to and among such persons and/or corporations, and in such manner as said Elsa Anna Burrows may by her last will and testament designate and appoint.

The grantor reserved the power at any time to alter the deed of trust, or to direct the trustees in the investment and re-investment of the trust estate.

In the same instrument Waters F. Burrows was given power at any time during her life to revoke, alter or amend the deed of trust, and the corporate trustee was required, upon his written request, to transfer, assign and pay over to him any part of the trust property.

The 8th paragraph of the said indenture provides that the agreement was to be construed according to the laws of the State of New York where it was made and where it was to be enforced.

(b) The second trust indenture for the benefit of Waters F. Burrows was dated August 10, 1935, between Elsa S. Burrows of Osprey, Florida, termed the "donor", Waters F. Burrows, husband of the donor, and Fiduciary Trust Company of New York, a trust company formed under the New York banking law, constituting the two trustees.

Under this instrument the donor irrevocably assigned and transferred certain securities to the trustee for the account of a trust fund from which it was directed that the entire net income be paid to Waters F. Burrows as long as he shall live, and after his death the entire net income to be paid to his daughter, Elsa Anna Burrows, as long as she shall live, and upon the death of the survivor of said Waters F. Burrows and Elsa Anna Burrows, then

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the principal of the trust fund should be paid over and delivered to and among the issue, parents, or spouse of such survivor, and in such manner as said survivor may, by his or her last will and testament designate and appoint.

The trustees were given the power to make distribution of principal in advance if they deemed such action advisable, and were authorized to pay over the whole or any part of the principal discharged from any trust to the beneficiary entitled at the time to such payment to the current income of the property so paid over. The donor was given the power to remove one or both of the trustees at any time.

The trusts for the benefit of Elsa S. Burrows were:

(C) A trust indenture also dated February 10, 1930, which was executed at Scarsdale, New York. Waters F. Burrows is named as the grantor; he and his wife, Elsa S. Burrows, are named as individual trustees, and Central Hanover Bank and Trust Company is designated as the corporate trustee. Except that Elsa S. Burrows is beneficiary of this trust instead of Waters F. Burrows, its terms and provisions are identical with those of the previously described instrument bearing the same date.

(D) The fourth trust is created by the terms of the will of Oscar Scherer, deceased. The testator was the father of Elsa S. Burrows and was at all times a resident of the State of New York. He died there and his will was probated by the Surrogate of New York County. His will contained specific bequests, one of which was the sum of $300,000 given to his daughter absolutely. All the residue and remainder of his property was given to five trustees, his widow, Anna B. Scherer, his daughter, Elsa, his brother, Albert G. Scherer, his son-in-law, Waters F. Burrows, and the Chatham & Phenix National Bank of the City of New

York for the life of his widow Anna. At her death the principal was bequeathed to Elsa Burrows absolutely and the trust terminated (paragraphs Eighth and Tenth of will).

There was held out from this residue, however, the sum of $100,000 which was given in trust, not to the five trustees who received the residue, but to a single trustee, the Chatham & Phenix National Bank of the City of New York (now succeeded by the Manufacturers Trust Co. of that city). This trust is one of the subjects of the tax attacked in this suit. The Trust Company was directed to pay the income therefrom to Elsa Burrows semi-annually during her life. She was authorized to dispose of the principal by her last will. The paragraph of the will creating this trust concludes with this statement: (Paragraph Ninth)

> "My reason for making the above trust is that I wish that the said sum of money shall be safeguarded against all unforseen contingencies of business and in order that my daughter may also be assured of the income of that sum."

All intangible personal property constituting the principal of each of the above trust funds was always located in the City, County, and State of New York, and never had been located in Florida.

The assessment was assessed by the appellees under the provisions of Chapter 20724, Laws of 1941, of the State of Florida (F.S.A. Title 13, Chapter 199, Sec. 199.01) which, so far as material, reads as follows:

> "Intangible personal property" is hereby defined as all personal property which is not in itself intrinsically valuable but which derives its chief value from that which it represents. 'Taxpayers' shall mean a person, firm or corporation who or which shall be liable for taxes under this chapter for intangible personal property.

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"Sec. 199.02 Classes of Intangible Personal Property.

For the purpose of taxation intangible personal property is hereby divided into four classes to be known as class A, B, C, and D, intangible personal property:

(1) • • •

(2) Class B intangible property is hereby defined as being • • • the beneficial interest of residents of Florida in trust estates of all kinds when the trustee resides outside of the State of Florida, or if the trustee is a corporation and has its principal place of business outside of the State of Florida. • • •

(3) • • •

(4) Class D intangible personal property shall include all other intangible personal property not embraced in Classes A, B, or C. • • •"

Sec. 199.04 Assessment of intangible personal property:

"Intangible personal property shall be assessed by the tax assessor of each and every county in the State of Florida on a separate tax roll, which shall be designated the intangible personal property tax roll, the form of which shall be prescribed by the comptroller. Such tax roll shall distinctly show the name and address of the taxpayer and the amount of valuation for tax purposes of intangible personal property, assessed against such taxpayers on said tax roll."

Sec. 199.03 Basis of Assessment.

"The tax assessor shall assess all intangible personal property at its full cash value."

Sec. 199.07 Returns of intangible personal property for taxation.

"It is hereby made the duty of every person, firm or corporation owning or having control, management or custody of intangible personal property in this

state which is subject to taxation under the laws of Florida, including trustees, executors, administrators, receivers and all other fiduciaries, to file a sworn return of the same with the county assessor of taxes in the proper county on or before the first day of April of each and every year, giving the character, description, location and full cash value of the same according to the best of the knowledge of belief of the person making the return. * * *

Sec. 199.11 Annual Levy:

"On and after January 1st, 1942, there is hereby annually levied and assessed on all intangible personal property, to be assessed and collected as other taxes are assessed and collected, and to be paid into the intangible tax fund of the State of Florida and apportioned therefrom as hereinafter set forth, the following tax:

(1) * * *

(2) On all Class B personal property one mill on the dollar of the taxable value of such Class B intangible personal property.

(3) * * *

(4) On all Class D intangible personal property one mill on the dollar of the taxable value of such Class D intangible personal property."

The tax for the fiscal years 1935 to 1944 appeared on the assessment roll of Sarasota County.

Eight of these assessments were directed to "Walter Burrows & wife" for the years 1935, 1936, 1937, 1938, 1939, 1940, 1941 and 1942. A separate assessment was made to Mrs. Elsa S. Burrows for the years 1940, 1941, 1942, 1943 and 1944.

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All of the bills are entitled "Statement of Intangible Property Tax" and specify the three classes taxes in the following language:

"Class A Value

All moneys, United States legal tender, notes, bank deposits of all kinds, certificates of deposit, checks, bills of exchange, cashier's and certified drafts, and money placed with savings, building and loan associations.

Tax 1/20 of 1 mill (5¢ per $1000)"

"Class B Value

All stocks, or shares of incorporated or unincorporated companies; all bonds except bonds of the several municipalities and counties of Florida, and also such bonds or governmental bonds as may be exempt from taxation under the Constitution or laws of the State of Florida. See section 3 of Chapter 20724, Acts of 1941."

Tax 1 mill ($1.00 per $1,000)"

"Class D Value

All other Intangible Personal Property NOT embraced in Classes "A", "B", or "C" (mortgages on Real property situated outside of Florida included) Tax 1 mill ($1.00 per $1,000)"

Exhibits A to M inclusive annexed to Second Amended Complaint.

Statutory Provisions as to Jurisdiction

This appeal is taken under Section 344 of Title 28 of the United States Code which is likewise section 237 of the Judicial Code. This section provides that a final judgment or decree in any cause in the highest court of a state in which a decision in the suit could be had, where is drawn in

question the validity of a statute of any state on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity may be reviewed by the Supreme Court of the United States on appeal.

Statute of the State Involved

The Statute of the State of Florida involved is Chapter 20724, Laws of 1941 (F. S. A. Title 13, Chapter 199) as follows:

> "For the purpose of taxation intangible personal property is hereby as all personal property which is not in itself intrinsically valuable but which derives its chief value from that which it represents • • • CLASS B intangible personal property is hereby defined as being • • • the beneficial interest of residents of Florida in trust estates of all kinds when the trustee resides outside of the State of Florida, or if the trustee is a corporation and has its principal place of business outside of the State of Florida. • • •"

Date of Judgment or Decree Sought to Be Reviewed

The date of the final judgment of the Supreme Court of the State of Florida sought to be reviewed is 12 January, A. D. 1948.

The date upon which the application for appeal is presented to the Chief Justice of the State of Florida is 16th February, A. D. 1948.

Opinion Delivered in the Court Below

A copy of the opinion of the Supreme Court of the State of Florida is hereto appended and marked Exhibit A. This is the only opinion of any court in this cause.

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Manner in Which Federal Question Was Raised

The Federal question was raised at the outset and urged throughout all the proceedings in the State Court. The second amended complaint, in paragraph VI thereof, alleged the Intangible Tax Law of Florida to be "in violation of Section 17 of the Bill of Rights of the Constitution of the State of Florida and attempts to deprive plaintiff, Elsa S. Burrows, of her property without due process of law in contravention of the provisions of the Fourteenth Amendment to the Constitution of the United States."

Also in the appellants' brief in the Supreme Court of the State of Florida it is stated in the "History of the Case" (page 5 thereof) that "plaintiffs sought a declaratory judgment declaring * * * whether or not the taxing statute imposed a tax on income in violation of the Constitution of Florida, and whether or not it deprived plaintiffs of their property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, and Section 12 of the Florida Declaration of Rights. * * *"

Question X of the same appellants' brief (p. 32) thereof, asked "Does the tax violate the Fourteenth Amendment to the Constitution of the United States, and Section 12 of the Declaration of Rights of the Constitution of Florida by depriving plaintiffs of their property without due process of law?"

This question was replied to in the brief of the appellees (pp. 20-21)—the appellees contending that this Federal constitutional question had been "decided by this court adversely to the appellants in *Wood* v. *Ford, supra,* 148 Fla. 66.

Even if the constitutional question had been raised for the first time in the Appellate Court under Florida practice, it would be timely asserted. *Parker* v. *Town of Callahan,*

115 Fla. 266, 156 So. 334, where Davis, C. J., writing for the Florida Supreme Court, said:

> "It was also contended that the constitutional validity of the acts brought in question was challenged for the first time in this court. Even if this contention is accurate, it is not reversible. A fundamental constitutional error may be raised at any time." (p. 336)

Likewise in June, 1945, the same court endorsed again the propriety of such practice. *Town of Monticello* v. *Finlayson*, 156 Fla. 568 (23 So. 2d 843) where Brown, J., writing of the Court, said:

> "Be that as it may, this court has held that a fundamental error, based on the unconstitutionality of a statute, can be raised for the first time in the Supreme Court." (p. 572)

The opinion of the Supreme Court of Florida, appended to this statement, cites cases in which the Federal question was urged although it does not mention the Fourteenth Amendment in *haec verba*. These cases are *Wood* v. *Ford*, 148 Fla. 66, and *Owens* v. *Fosdick*, 153 Fla. 17, expressly stating that "the trust instruments, therefore, are ruled by the principle stated in *Wood* v. *Ford, supra*, and not by *Owens* v. *Fosdick.*" It passed over any specific reference to Question X in the appellants' brief by the statement "All other questions raised by the appellants on this appeal have been duly considered and are found to be without merit."

The paragraphs of the appellants' petition for rehearing numbered First, Second, Third and Fourth also stress the violation of the appellants' constitutional rights by the State Court rulings.

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Substantiality of Questions Involved

The opinion of the Supreme Court referring to the provisions of each of the four trusts considered, said:

> "the beneficiary named is • • • the owner of intangible personal property consisting of a vested beneficial right, interest or estate in a trust fund.
>
> "This right, interest or estate is separate and distinct from the property right owned and held by the trustees in the personal property which comprises the corpus of the trusts." (page 8, Opinion)

Thus that court recognized it could not tax the corpus of the trusts.

It quoted its own opinion in the case of *Owens* v. *Fosdick,* as follows:

> "the court concluded that if the cestui que trust had a vested, beneficial interest or estate in the trust at all, such interest was in the nature of an interest or estate in income, and that a tax thereon would amount, in effect, to a tax on income, contrary to the spirit and intent of Section 11 of Article IX of the Constitution of Florida."

That court recognized it could not tax the income of the trust estate. It searched for something else to tax besides corpus and income. There was nothing else but income hence no tax could be validly sustained.

The court, however, attempts to justify a tax on the equitable interest of the beneficiary—for example—in the case of the testamentary trust for appellant, Elsa S. Burrows, by saying that she "is entitled to receive the income from the trust for life, with the concomitant right to alienate it, there being no restraints on alienation; and she is given the general power of appointment by will, which confers upon her the absolute right to determine what person

or persons shall take the corpus of the estate after the trust has terminated."

Consequently the court held that the trust instruments are not ruled by the principles stated in *Owens* v. *Fosdick*, and impliedly there was no tax on income.

However, for the purpose of this statement we will analyze only the testamentary trust to demonstrate the substantiality of the questions involved.

There IS restraint on alienation in the provision of the will creating the trust. After several bequests, including one of $300,000 absolutely to Elsa Burrows (para. Sixth of will), the remainder is given to trustees to pay the net income to the testator's widow for life, and upon her death, to Elsa Burrows absolutely (paragraph Tenth of will), except for a bequest of one hundred thousand dollars which is provided for by paragraph Ninth of the will in the following language:

> "Ninth. Upon the death of my widow, or upon my death should she predecease me, I give and bequeath to the Chatham and Phenix National Bank of the City of New York, the sum of One hundred thousand dollars out of my residuary estate, in Trust, however, to invest the same in good and lawful securities, to collect and receive the income and interest therefrom and to pay the same to my daughter, Elsa S. Burrows, semi-annually during her life.
>
> "I hereby authorize and empower my daughter Elsa M. Burrows, to dispose of the last mentioned sum of one hundred thousand dollars by her Last Will and Testament.
>
> "Should my daughter, Elsa M. Burrows, die without disposing of the above mentioned sum by will, or should she predecease me; then said sum shall be distributed among my legal heirs then surviving, per stirpes, and not per capita.
>
> "My reason for making the above Trust Fund is that I wish that the said sum of money shall be safeguarded

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against all unforeseen contingencies of business and in order that my daughter may also be assured of the income of that sum."

The obvious construction of this language is that the testator decrees a restraint on alienation since he wants this small backlog of $100,000 to be held intact against "all unforeseen contingencies."

Secondly, the general power of disposition given over this trust by will does not create a species of property to be taxed by Florida.

An analogous situation was before this court in the case of *Wachovia Trust Co.* v. *Doughton*, 272 U. S. 567, where the court held the appointee takes, not as legatee of the one who exercises the power of appointment, but as legatee of the original creator of the trust, saying:

> "We think the assets of the trust estate established by the will of Haynes had no situs actual or constructive, in North Carolina. The exercise of the power of appointment was subject to the laws of Massachusetts and nothing relative thereto was done by permission of the state where Mrs. Taylor happened to have her domicile. No right exercised by the donee was conferred on her by North Carolina. A state may not subject to taxation things wholly beyond her jurisdiction or control." (p. 575.)

So here, the assets of the trust estate established by the will of Oscar Scherer had no situs in Florida. The exercise of the power of appointment was subject to the laws of New York. No right exercised by the donee was conferred by Florida. Consequently this power cannot be property subject to tax in that State.

In *Brooke* v. *Norfolk*, 277 U. S. 27, the state property tax was assessed to a life beneficiary, on a res composed of intangibles, when both the testator and the trustee were

residents of another state where the trust was administered. This was held violation of the 14th Amendment.

To the same effect was the ruling in *Safe Deposit & Trust Co.* v. *Virginia*, 280 U. S. 83.

Greenough v. *Tax Assessors*, decided June 9, 1947, U. S. Supreme Court.

The United States Supreme Court has always reserved the right to determine from the statute upon what the tax is assessed. It will not be swayed by nomenclature.

Senior v. *Braden*, 295 U. S. 422;
Educational Film Corp. v. *Ward*, 282 U. S. 379.

Since the Supreme Court of Florida has decided that the intangible personal property taxes assessed against the appellants are valid, there is here presented, for the reasons above given and under the authorities cited, a substantial question as to whether such ruling as to the validity of the state statute is not repugnant to the 14th Amendment of the Constitution of the United States as sustaining the taking of appellants' property without due process of law. Consequently an appeal should be allowed.

(28 U. S. C. 344, Judicial Code, sec. 237).

It is, therefore, respectfully submitted that this court has jurisdiction of this appeal under section 237 of the Judicial Code.

RICHARD J. MACKEY,
(S.) CLYDE H. WILSON,
Of Counsel for Appellants.

Dated: February, 1948.

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APPENDIX

IN THE SUPREME COURT OF FLORIDA, JUNE TERM, A. D. 1947. EN BANC.

ELSA S. BURROWS, Joined by Her Husband, WATERS F. BURROWS, *Appellants,*

vs.

CHARLIE HAGERMAN, as Tax Collector of Sarasota County, et al., *Appellees*

Opinion Filed December 12, 1947

An Appeal from the Circuit Court for Sarasota County, W. T. Harrison, Judge

Clyde H. Wilson, for Appellants.

Lewis H. Tribble and Walton, Hubbard, Schroeder, Lantaff & Atkins and S. O. Carson, for Appellees.

SEBRING, *J:*

Elsa S. Burrows and Waters F. Burrows, her husband, have filed their second amended bill of complaint in the Circuit Court of Sarasota County, in which they allege, in substance, that they are residents of Sarasota County; that each of them is a beneficiary under separate trust instruments executed in the State of New York under which the trust property is held and managed in New York State, by New York corporate trustees; that the plaintiffs contend that they are not required by law to make tax returns on said property interests, or to pay taxes in Florida on said interests, for the reason that since property interests do not constitute intangible personal property held, owned, managed or controlled by plaintiffs "in this State"; that, despite their contentions, the tax collector of Sarasota County is attempting to collect taxes, interest and penalties assessed for the years 1935 to 1942, inclusive, upon said property interests; that the plaintiffs are not required to pay taxes on such beneficial interests but, but even if they were, the assessments on which the taxes are based are

void and unenforceable, because they are made in the name of "Walter Burrows and wife," and not in the names "Waters F. Burrows" and "Elsa S. Burrows."

The bill also alleges that the tax collector of the county is attempting to collect intangible personal property taxes against the plaintiff Elsa S. Burrows, for the year 1943, and back assessments on the 1943 tax roll for the years 1940, 1941 and 1942, because of her alleged taxable interests under two of the trust instruments described in the bill of complaint, but that the assessments are void and unenforceable because made by the tax assessor under the mandatory direction of the State Comptroller who allowed to the tax assessor "no discretion in the matter and thereby usurped the duties of the aforesaid tax assessor." Other matters are also alleged, which the plaintiffs charge void this assessment.

The bill alleges, further, that these void and unenforceable assessments constitute a cloud on the title to various parcels of real estate in Sarasota County owned by the plaintiffs; that the plaintiffs are owners by the entireties of an undivided one-half interest in and to certain lands lying and being in Sarasota County, said interest being owned by them as "Waters F. Burrows and Elsa S. Burrows, husband and wife"; that the plaintiffs have a purchaser for the property who refuses to accept title unless the taxes are paid or are declared by a court of competent jurisdiction not to constitute a charge or lien against the lands held by the plaintiffs as an estate by the entireties.

In the prayer of the bill of complaint the plaintiffs ask the court take jurisdiction of the cause and the subject matter and inquire into and determine the legality and validity of the tax assessments, and as to whether or not the plaintiffs, or either of them, are liable for the payment of said assessments; that a declaratory judgment be entered declaring whether or not the lands owned by entireties are liable and subject to any legal liability, lien or otherwise, as a result of the tax assessments; whether the intangible tax assessments against "Walter Burrows and wife" constitute any legal liability as against the plaintiffs, Waters F. Burrows and his wife, Elsa S. Burrows, or either of them,

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and, in event taxes are due under the assessments, then for what percentage of the assessments each of the plaintiffs is liable; whether the trusts set out in the bill of complaint are taxable under the intangible tax laws of the State of Florida; and for other relief.

A motion to dismiss the bill of complaint was filed by the defendants. Upon a hearing the motion to dismiss was granted and the bill of complaint was dismissed. The plaintiffs have taken an appeal from that order.

It is our view that the chancellor acted correctly in sustaining the motion to dismiss the bill of complaint as to the separate tax assessment made against the plaintiff Elsa S. Burrows. It may well be, as alleged in the bill of complaint, that the Comptroller of the State of Florida did mandatorily direct the tax assessor of the County to assess and back-assess the intangible personal property of said plaintiff, and allowed to the assessor "no discretion in the matter"; but it does not necessarily follow from this that the assessment and back assessments so made, were not in face based upon a fair and just valuation of the property interest involved. This ground, therefore, is without merit. Other grounds alleged by the plaintiff for voiding the assessment and back assessments have been considered, and we find them likewise to be without merit.

As to the assessments made jointly against both plaintiffs, the bill of complaint reveals the following information:

The first trust instrument described in the bill of complaint was executed in New York on 10 August, 1935, between the plaintiff, Elsa S. Burrows, as donor, and the plaintiff, Waters F. Burrows, and the Fiduciary Trust Company of New York, as joint trustees. Under the instrument the donor irrevocably assigns, transfers and delivers to the trustees certain property to be held, managed and disposed of by them, with directions ther: "The entire net income from the trust fund shall be paid to Waters F. Burrows so long as he shall live . . . From and after the death of said Waters F. Burrows, the entire net income shall be paid to Elsa Burrows, daughter of the Donor, so long as she shall live."

The trust instrument provides that "upon the death of

the survivor of said Waters F. Burrows and Elsa Anna Burrows, the then principal of the trust fund shall be paid over and delivered to and among the issues, parents or spouse of such survivor, and in such manner as such survivor may by his or her last will and testament designate and appoint." The trust instrument also provides "all payments of income shall be made periodically and as frequently as may be convenient and in any event not less often than quarterly." It provides further, "It being the intention that the Trustees shall be free to make distributions of principal in advance of the time hereinabove specified if they shall deem such action advisable by reason of any emergency or by reason of any change of circumstances, the Trustees are therefore authorized, at such time or times and for such reason as they deem proper and sufficient in their absolute discretion, to pay over the whole or any part of the principal discharged of any trust, to the beneficiary entitled at the time of such payment to the current income of the property so paid over."

The second trust instrument described in the bill was executed in New York on 10 February, 1930, between the plaintiff, Elsa S. Burrows, as grantor, and the plaintiffs, Waters F. Burrows and Elsa S. Burrows, as individual trustees, and Central Hanover Bank and Trust Company, a New York corporation, as corporate trustee. Under this instrument the grantor directs the trustees to "pay the net income thereof in equal monthly installments to Waters F. Burrows, the husband of the grantor during the term of his natural life. Upon the death of said Waters F. Burrows, to apply the net income thereof to the maintenance, support and education of Elsa Anna Burrows, daughter of the grantor, during her minority, and to accumulate the balance of said income and to pay the same to the said daughter of the grantor, when she shall have reached the age of twenty-one years; thereafter to pay the net income in equal monthly installments to the said Elsa Anna Burrows during her natural life, and upon her death to pay over and distribute the principal thereof to and among such persons and/or corporations and in such manner as said Elsa Anna Burrows may by her last Will and Testament designate and appoint . . ."

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The trust instrument also contains the following provisions: "The trustees shall have the following rights and powers . . .

"(b) Upon written request to pay over or apply from time to time, to the use of any beneficiary of the trust hereby created, any portion of the principal of the trust estate which the Trustees in their uncontrolled discretion may deem necessary, in case of the insufficiency of income to supply the needs of such beneficiary; . . ."

"(p) In the event of any difference of opinion or disagreement between the Trustees as to the administration of the trusts hereby created, the decision of the individual Trustees delivered in writing to the Corporate Trustee shall be controlling; . . ." "Waters F. Burrows is hereby given power, at any time, during his life, to revoke, alter or amend this deed of trust or any term or provision thereof, except that he shall have no power to alter or diminish the compensation of the Corporate Trustee. The Corporate Trustee shall, upon the written request of Waters F. Burrows, transfer, assign and pay over to him any part of the trust property . . ."

The third trust instrument involved in this controversy was also executed on 10 February 1930, in the State of New York. In this instrument the plaintiff, Waters F. Burrows, is named as the grantor, he and his wife Elsa S. Burrows are named as individual trustees, and Central Hanover Bank and Trust Company is designated as the corporate trustee. The plaintiff, Elsa S. Burrows, is named as beneficiary of the trust instead of the plaintiff, Waters F. Burrows, and, except for this difference, the terms and provisions of this trust instrument are identical with those of the second trust instrument described above.

The fourth trust involved is created by the last will and testament of one Oscar Scherer, the father of the plaintiff, Elsa S. Burrows. The will provides for the residuum of the testator's estate to be held and managed by trustees who shall pay the net income derived therefrom to his widow for life. It provides further:

> "Upon the death of my widow, or upon my death should she predecease me, I give and bequeath to

the Chatham and Phenix National Bank of the City of New York the sum of one hundred thousand dollars out of my residuary estate, in Trust, however, to invest the same in good and lawful securities, to collect and receive the income and interest therefrom and to pay the same to my daughter, Elsa M. Burrows, semi-annually during her life.

"I hereby authorize and empower my daughter, Elsa M. Burrows, to dispose of the last mentioned sum of one hundred thousand dollars by her Last Will and Testament."

Section 199.07, Florida Statutes, 1941, makes it the duty of "every person, firm or corporation owning or having control, management or custody of intangible personal property in this state which is subject to taxation under the laws of Florida . . . to file a sworn return of the same with the county assessor of taxes in the proper county on or before the first day of April of each and every year . . ." It is admitted by the plaintiffs that they have not filed any returns on the property involved in this controversy. They submit as their reason for not doing so that the trust instruments under which they derive their interests were executed in New York; that the corporate trustees are domiciled in that state; and that the trust property which they are administering is located there. They contend that because of these facts they are not persons "owning or having control, management or custody of intangible personal property *in this State* which is subject to taxation under the laws of Florida."

The contention made by the plaintiffs is not tenable. As to each of the trusts involved, the beneficiary named in the particular trust instruments creating them is the owner of intangible personal property consisting of a vested beneficial right, interest or estate in the trust fund. This right, interest or estate is separate and distinct from the property right owned and held by the trustees in the personal property which comprises the corpus of the trusts. While, perhaps, the legal title to the personal property held by the trustees may be taxes where held and managed by the trustees, the taxing situs of the separate distinct

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benefical interests of the beneficiaries in the trust funds is at the domicile of the owners in Florida. See Wood *v.* Ford, 148 Fla. 66, 3 So. 2d 490.

The property interests of the beneficiaries in the present case are quite different from the interests created by the trust instruments before this court in Owens *vs.* Fosdick, 153 Fla. 17, 13 So. 2d 700. As we pointed out in Owens *vs.* Fosdick, with reference to the interest of the beneficiary arising from the trust instruments there under consideration: "All that she has is the prospect or expectation of receiving income in the future, if she be living at the time of the distribution of income, which, practically speaking, amounts to nothing unless and until the income is received. In no event may she have a claim of demand against the trust estate, unless the securities of the estate yield an income. Upon death, the income is no longer a claim against the trustee but passes with the corpus to designated remaindermen. Meanwhile, if the cestui que trust attempts to assign, sell, or encumber her prospects, or permits or suffers the same to be taken by a receiver, trustee, or representative of creditors in any manner, or if legal proceedings are instituted to enforce claims of creditors against the income, or if the beneficiary is adjudged a bankrupt, a forfeiture of all rights to income results under the spendthrift clauses contained in seven of the instruments; until the rights, claims and demands of creditors are cancelled, terminated, or otherwise extinguished. The cestui que trust has no power of appointment of the corpus, no future estate in remainder, and no present interest in the res aside from a right in equity to compel the performance of the trust. In short, so far as the trust res is concerned, there never has been, nor never can be, a time when the respondent, Emily Bedford Fosdick, could, or can, assert any right of possession, control, or ownership over the securities."

In the opinion the court concluded that if the cestui que trust had a vested beneficial interest or estate in the trust at all, such interest was in the nature of an interest or estate in income, and that a tax thereon would amount, in effect, to a tax on income, contrary to the spirit and intent of Section 11 of Article IX of the Constitution of Florida.

The narrowly restrictive features appearing in the trust instruments in the cited case are not present in any of the trust instruments which are now before us on this appeal. In the first trust instrument the plaintiff, Waters F. Burrows, as cestui que trust, has a fixed lawful right to the income of the trust for life with a present right to alienate it; there being nothing in the trust instrument which attempts to restrain his right to alienate future anticipated income. He has the right, in the event he survives the daughter, Elsa Anna Burrows, to dispose of the principal trust fund to and among his "issue, parents or spouse, and in such manner" as he may "by his . . . last will and testament designate and appoint." He has the reasonable expectation during his lifetime of receiving all or a portion of the corpus of the estate, because the trust instrument provides that the trustees (of which he is one) are authorized, "at such time or times and for such reason as they deem proper and sufficient in their absolute discretion, to pay over the whole or any part of the principal discharged of any trust, to the beneficiary entitled at the time of such payment to the current income of the property so paid over."

Under the second trust instrument the cestui que trust has the vested right to the income from the trust for life, with the power to alienate it; and has the power to require the trustees, at any time, to "transfer, assign and pay over to him any part of the trust property." The same is true with reference to the third trust instrument.

Under the fourth trust instrument the beneficiary, Elsa S. Burrows, is entitled to receive the income from the trust for life, with the concomitant right to alienate it, there being no restraints on alienation; and she is given the general power of appointment by will, which confers upon her the absolute right to determine what person or persons shall take the corpus of the estate after the trust has terminated. The trust instruments, therefore, are ruled by the principle stated in Wood *vs.* Ford, supra, and not by Owens *vs.* Fosdick.

The next question raised on the appeal is with reference to the assessments under which the plaintiffs are sought to be held liable for payment of the taxes. Section 199.04,

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Florida Statutes, 1941, provides that: "Intangible personal property shall be assessed by the tax assessor of each and every county in the State of Florida on a separate tax roll . . . Such tax roll shall distinctly show the name and address of the taxpayer and the amount of the valuation for tax purposes of intangible personal property assessed against such taxpayer on said tax roll." The plaintiffs submit that the plaintiff, Waters F. Burrows, has never been known as "Walter Burrows", the name in which the assessments for the years 1935 to 1942, inclusive, have been made; and that, inasmuch as the statute directs that the tax rolls shall distinctly show the name and address of the taxpayer, and, inasmuch as Waters F. Burrows' name is not shown—even under the doctrine of idem sonans—the assessment does not comply with the statute and is void and unenforceable. They maintain further that, even should it be held by the court that the plaintiff, Waters F. Burrows, is sufficiently named in the assessment, the same may not be said for the plaintiff, Elsa S. Burrows, who is referred to in the assessment only by the words "and wife".

The rule of idem sonans will not be restricted to mean that the sounds produced by dissimilar spelling must be identical or indistinguishable from each other, but that they should be sufficiently alike in sound as not readily to suggest a difference to the mind of the hearer. Rhodes *v.* State, 74 Fla. 230, 76 So. 776. It will be observed that the surname of the plaintiffs, Burrows, correctly appears in the assessment; the Christian name being the only name improperly spelled. It appears to us that the names "Walter" and "Waters" as used in the assessment, are sufficiently alike in sound as not readily to suggest a difference to the mind of the bearer; especially when coupled with the name "Burrows", the correct surname of the plaintiff. It is our view, therefore, that the assessments are not wholly void in the ground asserted by the plaintiffs; and that they should be considered as though they had been made by the tax assessor against "Waters F. Burrows and wife". We are of the opinion, moreover, that under the facts of this case Elsa S. Burrows should not be heard to urge in a court of equity that the assessment against her as "wife" of "Walter Burrows" is unenforceable and void because the

assessment does not follow precisely the provision of the statute, which directs the assessor to "distinctly show the name . . . of the taxpayer." The law requires a taxpayer to return his property for taxes and pay the taxes due. The plaintiff, Elsa S. Burrows, has consistently ignored this requirement and has failed to pay the taxes for which she has been liable for a period of approximately ten years. Under the circumstances she cannot be heard to complain that the assessor of taxes did not make the assessments in as full and correct detail as doubtless he would have done had the plaintiff performed her duty and made her returns as required by law.

The plaintiffs next submit that should the court hold that an assessment against "Walter Burrows and wife" is sufficient as a legal basis for the collection of intangible personal property taxes against "Waters F. Burrows and Elsa S. Burrows, his wife," the assessments are invalid under the facts of this case for the reason that the tax liabilities of the plaintiffs are several, not joint, liabilities. They submit further that the liabilities of the plaintiffs being several, not joint, there is no method by which the amounts each should pay as taxes can be ascertained, as the assessments now stand, and consequently that one of the plaintiffs may be required to pay off and discharge the tax liability of the other.

As appears from the trust instruments which are being considered upon this appeal, the beneficiaries thereunder have separate, not joint, property interests in the trusts created thereby. The plaintiff, Waters F. Burrows, is the present owner of the beneficial rights, interests, or estates created by the first two trust instruments which we have described; the plaintiff, Elsa S. Burrows, is the owner of the beneficial rights, interests or estates under the third and fourth trust instruments. Each of the plaintiffs is separately liable for the payment of the intangible personal property taxes on the intangible personal property which each owns.

We are of the opinion that on the facts pleaded the chancellor acted correctly in sustaining the motion to dismiss the bill of complaint; for under these facts each of the plaintiffs, though denying liability, is nevertheless liable for the payment of intangible personal property taxes

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together with interest, penalties, and costs. However, it cannot be denied that the assessments made against the plaintiffs should have been separate, not joint, assessments against each plaintiff upon the separate beneficial trust interests or estates owned by each.

The Plaintiffs have submitted their cause to a court of equity and have asked the court to inquire into and determine the legality and validity of the tax assessments; to enter a declaratory judgment declaring whether or not the real property owned by them as an estate by entireties is subject to any legal liability, lien, or otherwise, as a result of the tax assessments; and if taxes are found to be due, then for what percentage of the assessments each of the plaintiffs is liable.

Under these circumstances we think that though the decree appealed from must be affirmed the affirmance should be without prejudice to the right of the plaintiffs to amend their bill within a reasonable time to be fixed by the chancellor, by admitting their individual tax liabilities, as found in this opinion, and praying for an ascertainment and determination of the amount, or amounts, owed to the taxing authorities of Sarasota County for taxes, interest, penalties and costs, by reason of their separate ownership of the beneficial property interests under the trust instruments which we have been considering; and that upon the ascertainment and determination of such amounts, and the payment thereof into the registry of the court for the benefit of the proper taxing officials of Sarasota County, the court below should enter its decree satisfying said taxes, interest, penalties and costs and discharging the plaintiffs, and each of them, and any and all property owned by them severally, jointly, or by entireties, of and from any joint or several lien or liability for or by reason of the accrual of the same.

All other questions raised by the appellants on this appeal have been duly considered and are found to be without merit.

The decree appealed from is affirmed, without prejudice to further proceedings in accordance with this opinion.

It is so ordered.

Thomas, C. J., Terrell, Buford, Chapman and Adams, J. J., concur.

Barns, J., dissents.

BARNS, *J.* dissenting:

Appellants' bill presented the facts concerning a controversy or adversary matter existing between themselves and the respondents. They invoked the jurisdiction of the Circuit Court, seeking a declaratory decree concerning the merits of the controversy. The facts plead by the bill are clearly presented by the able opinion prepared by Mr. Justice Sebring.

The bill seeks and specifically prays to have the Court inquire into and determine "whether the trusts as set out in this complaint are taxable under the intangible tax laws of the State of Florida;" "whether or not" the plaintiffs are liable for, and "whether or not" certain land is subject to certain taxes; and, among other things, further prays "that the duties, rights and responsibilities of the plaintiffs, Waters F. and Elsa S. Burrows, be declared and determined by the Court, and for such other and further relief as may be equitable and just."

As stated by the appellee, the one real question before the chancellor and before this Court was and is: "Is there any equity in the bill?" If so, the chancellor should be reversed, otherwise affirmed.

The test of a bill seeking a declaratory decree is not that the plaintiff shall state a controversy wherein it shall appear that the *merits* of the controversy are on the side of the plaintiff. The essential is that there be a *bona fide* and actual controversy; the place wherein merit is found is not so material. See 16 Am. Jur. p. 282; Sheldon *v.* Powell, 99 Fla. 782, 128 So. 258; Ch. #21820, Acts of 1943, F. S. A., 87. A bill seeking a "declaratory decree" may be sufficient even though it affirmatively appears from the bill that the plaintiff is not entitled to a final decree adjudicating that all or any of the merits are on his side of the controversy presented.

Upon the facts presented I think the bill has equity and that the decree sustaining defendants'-appellees' motion to dismiss was error and that it should be reversed.